Supreme Court, U.S.
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No. 01-1602

IN THE

Supreme Court of the United States

NEW YORK STOCK EXCHANGE, INC.,

Petitioner,

v.

MFS SECURITIES CORPORATION
and MARCO SAVARESE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

JAY N. FASTOW
Counsel of Record
ADAM P. STROCHAK
ELIZABETH M. AVERY
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Counsel for Petitioner

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(800) 274-3321 • (800) 359-6859

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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ARGUMENT

I. INTRODUCTION.

Respondents do not deny that this Court's decision in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), establishes that the presence or absence of procedural safeguards does not affect the applicability of the per se rule to a group boycott claim under Section 1 of the Sherman Act. They consequently cannot controvert that the Court of Appeals erred by deferring to the SEC, since SEC review of whether NYSE complied with procedural requirements of the Exchange Act cannot inform the issue of whether the per se rule or the rule of reason should govern Respondents' antitrust claims.

Respondents also do not deny that the Complaint alleges no facts showing that the claimed conduct of NYSE harmed competition or had any anticompetitive purpose. They maintain that their antitrust claims nevertheless should be treated under the per se rule, because MFS Securities allegedly was terminated as a member organization of NYSE and "destroyed financially." Such a result would conflict with both this Court's pronouncement in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), that conduct by a self-regulatory organization under the Exchange Act is governed by the rule of reason, and its declaration in *Northwest Wholesale Stationers* that conduct is subject to the per se rule only if, after "considerable experience," the courts place it in the exceptional category of agreements that are "always or almost always" anticompetitive. *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 458 (1986); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). Conduct that, as here, allegedly hurt one firm, but had no adverse impact on price, output or any other facet of competition, does not violate the antitrust laws at all, much

less fall within this standard for invocation of the per se rule. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (goal of antitrust laws is to protect *competition*, not competitors).

II. RESPONDENTS DO NOT DENY THAT THE COURT OF APPEALS' REFERRAL TO THE SEC CONFLICTS WITH *NORTHWEST WHOLESALE STATIONERS* AND SERVES NO PURPOSE.

NYSE's Petition showed that the Court of Appeals erred in refusing to decide whether the Complaint has stated facts showing the injury to competition necessary to plead a claim under Section 1 of the Sherman Act, and instead in *sua sponte* deferring to the SEC for review of the procedural propriety of NYSE's alleged conduct under the Exchange Act. Petition at 17-19.[1] Such SEC review can have no effect on the issue of whether to apply the per se rule or the rule of reason to this case. As the Court explained in *Northwest Wholesale Stationers*:

> [T]he absence of procedural safeguards can in no sense determine the antitrust analysis. If the challenged concerted activity of Northwest's members would amount to a *per se* violation of § 1 of the Sherman Act, no amount of procedural protection would save it. If the challenged action would not amount to a violation of § 1, no lack of procedural protections would convert it into a per se violation. . . .

472 U.S. at 293.

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1. Respondents mischaracterize the Court of Appeals' decision when they assert that, in invoking the doctrine of primary jurisdiction, "the Second Circuit rejected all four of Petitioner's arguments." Respondents' *Brief in Opposition to Petition for Writ of Certiorari*, dated May 15, 2002 ("Opp.") at 5.

Respondents do not even try to oppose this point. They merely suggest, without explanation, that such SEC procedural review of the issue could "materially assist" the District Court "in accordance with this Court's prior decision in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 299 (1973)." Opp. at 9. As noted in the Petition (at 19), however, *Ricci* was an implied repeal case. It has no bearing on whether to apply the per se rule or the rule of reason.

The Court of Appeals' invocation of the doctrine of primary jurisdiction thus was futile and contrary to decisions of this Court. *See Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 686 (1965) (doctrine of primary jurisdiction is "not a doctrine of futility" requiring "resort to a merely expensive and delaying administrative proceeding").

III. RESPONDENTS CANNOT CONTROVERT THAT THIS COURT'S DECISIONS PRECLUDE APPLICATION OF THE PER SE RULE TO THIS CASE.

Respondents likewise provide no cogent response to NYSE's showing that the Court of Appeals' decision conflicts with this Court's opinions with regard to the applicability of the rule of reason.

First, Respondents misconstrue *Silver*. The *Silver* Court recognized that it could not appropriately subject the self-regulatory actions of an exchange to the per se rule under the antitrust laws, since:

> The entire public policy of self-regulation, beginning with the idea that the Exchange may set up barriers to membership, contemplates that

> the Exchange will engage in restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act.

373 U.S. at 360.

For this reason, the Court held that the rule of reason analysis applies in such circumstances in order "to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act." 373 U.S. at 360. Not only do Respondents ignore this analysis, they also fail to address the explanation of *Silver* in *Jacobi v. Bache & Co.*:

> Within the area of supervised self-regulation contemplated by the Securities Exchange Act, *per se* concepts are generally displaced and the courts are to examine whether the particular restraint, even though it would be a *per se* violation if performed by others, was reasonable.

520 F.2d 1231, 1237-38 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976). (Cited in Petition at 14.)

As the District Court held (*see* Petition, App. B, 20a), this doctrine requires rule of reason treatment here and (since the Complaint alleges no facts showing anticompetitive purpose or effect) dismissal of this case.

Second, the more general law with respect to group boycott claims has evolved significantly since *Silver*. The Court has declared that per se prohibition should apply only in the exceptional situation where the courts' prior experience enables them to know, without examining the particular facts of the case, that the type of restraint at issue is "always or almost always" anticompetitive.

See, e.g., *FTC v. Indiana Fed. of Dentists*, 476 U.S. at 458 (per se rule "is not to be expanded indiscriminately," and should be applied only where the economic impact of the challenged conduct is "immediately obvious"); *BMI*, 441 U.S. at 19-20, and discussion in Petition at 11-12, 15-16. On this basis, the Court in *Northwest Wholesale Stationers* declined to apply the per se rule to the expulsion of a member of a purchasing co-operative. 472 U.S. at 296-297 (expulsion did not necessarily indicate "anticompetitive animus" and therefore a "probability of anticompetitive effect").

Conceding that there are about 500 floor brokers on the NYSE (Petition, App. D at 28a-29a), Respondents state no facts showing that NYSE's alleged conduct had any adverse impact on price, output or any other aspect of competition. They allege that NYSE's conduct was unique in the history of the Exchange, and done for reasons wholly unrelated to competitive concerns. *See, e.g.*, Opp. at 3 (the alleged conduct was assertedly "motivated by an effort by the NYSE to curry favor with" federal enforcement agencies); *id.* at 4 (stating "this is the first time in the history of the NYSE" that the alleged conduct occurred).

Respondents nonetheless argue that the circumstances here warrant per se treatment, because MFS Securities assertedly was "destroyed financially" (Opp. at 8). The Court repeatedly has made clear, however, that the exclusion of one firm does not show injury to competition at all, much less the plainly anticompetitive effects that give rise to the exceptional case warranting invocation of the per se rule. *See, e.g.*, *NYNEX v. Discon, Inc.*, 525 U.S. 128, 139 (1998) (claiming one firm is harmed "does not automatically show injury to competition"); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31 (1984) (adverse effect on competition not proved by exclusion of one anesthesiologist).

In declining to affirm the District Court's dismissal of the case, the opinion of the Court of Appeals thus conflicts with this Court's decisions for this reason as well.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

JAY N. FASTOW
Counsel of Record
ADAM P. STROCHAK
ELIZABETH M. AVERY
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Counsel for Petitioner

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